Perdana Properties Bhd v Yong Chon

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 24-652 OF 1989
ABU MANSOR J
9 NOVEMBER 1989

Civil Procedure — Writ of possession — Stay — Whether leave required to issue writ — Tenants not served with notice of proceedings — Whether fatal — Inordinate delay on part of applicant — Rules of the High Court 1980, O 45 & O 83

Land Law — Sale by public auction — Respondent bona fide purchaser for value — Whether grant of certificate of sale and registration frees purchaser of liability — National Land Code 1965, s 267

On 1 March 1989, Bank Bumiputra Malaysia Bhd ('the bank') obtained an order to foreclose the premises known as No 158 Jalan Ngee Heng, Johore Bahru ('the premises'). On 27 May 1989, there was a public auction of the premises and the plaintiff agreed to purchase at a purchase price of $139,000. The defendant refused to give vacant possession and was still in occupation of the premises despite the order dated 1 March 1989. Hence, on 18 September 1989, the plaintiff applied ex parte for leave to issue a writ of possession against the defendant. On 3 October 1989, the court granted leave to the plaintiff. Then, the defendant applied to have the writ of possession suspended and/or stayed under the inherent jurisdiction of the court or under O 45 r 11 of the Rules of the High Court 1980 until the determination of the relief to which the defendant is applying to the court, namely, the foreclosure action.

Held, dismissing the defendant's application:

(1) Whether the court will grant the order of suspension or stay prayed for must depend on the purpose for which it is made. It will also depend to a large extent on the likely success of such a step.

(2) There was inordinate delay as the defendant came to know about this foreclosure on 2 June 1989 but did not take any positive step until 11 October 1989.

(3) The sale to the plaintiff was by virtue of s 267 of the National Land Code 1965. Upon the plaintiff being granted the certificate of sale, the sale shall be registrable and the certificate shall free the purchaser of any more liability.

(4) Since the judgment or order giving possession of the premises was by virtue of a charge action to which O 83 applies, there was no necessity for the plaintiff to apply for leave to issue a writ of possession. Therefore, the requirement of O 45 r 3(3) was not required to be complied with. It is only in an application for leave outside the ambit of O 83 or where O 83 does not apply that one had to resort to O 45 r 3.

(5) There is no reason for the court to suspend or stay the writ of possession which was issued by virtue of the fact that the plaintiff was a bona fide purchaser at an auction sale where the respondent was clothed with a registrable certificate of sale.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-510-89.]

Cases referred to

1 *Woo Yew Chee* v *Yong Yong Hoo* [1979] 1 MLJ 131 (refd)
2 *Hock Hua Bank Bhd* v *Sahari bin Murid* [1981] 1 MLJ 143 (refd)
3 *Lim Yoke Foo* v *Eu Finance Bhd* [1985] 1 MLJ 17 (refd)
4 *Subramaniam* v *Muthiah Chetty* [1934] MLJ 222 (refd)
5 *Oversea-Chinese Banking Corp Ltd* v *Sindoma Realty Sdn Bhd* [1989] 1 MLJ 377 (refd)

Legislation referred to

National Land Code 1965 s 267
Rules of the High Court 1980 O 45, O 83

L Parthiban for the plaintiff/respondent.
Yap Siong Cheng for the defendant/applicant.

Cur Adv Vult

Abu Mansor J: This is an application by the defendant/applicant to have the writ of possession issued in this case suspended and/or stayed under the inherent jurisdiction of the court or under O 45 r 11 of the Rules of the High Court 1980 until the determination of the relief to which the defendant/applicant is entitled and is applying to the court in an action, namely, Johore Bahru High Court Originating Summons No 564 of 1988 ('the foreclosure action'). This application for suspension or stay is supported by the applicant's affidavit encl (11). I heard arguments in chambers and after which I reserved judgment to a date to be fixed. My judgment is as follows.

The background facts of this case leading to this application by the defendant are these. In the above foreclosure action, the plaintiff-chargee bank therein obtained an order on the 1 March 1989 to foreclose premises No 158, Jalan Ngee Heng, Johore Bahru (hereinafter called the 'said premises'). It transpired that after the order of 1 March 1989 in the foreclosure action, there was a public auction of the premises held on 27 May 1989 and the plaintiff herein in Originating Summons No 652 of 1989 agreed to purchase at a purchase price of $139,000 pursuant to which contract of sale the plaintiff paid $13,900 to the senior assistant registrar being the deposit of the purchase price of the said property. On 24 July 1989, the plaintiff then paid the full balance of the purchase price being $125,100.

In spite of the court order dated the 1 March 1989 that the owner or any occupants do give vacant possession of the said premises within seven days from the date of any sale, the defendant/applicant herein refused to give vacant possession and was still occupying. Hence on 18 September 1989, the plaintiff/respondent herein applied ex parte for leave to issue a writ of possession against the above-named defendant/applicant. It was supported by an affidavit of the plaintiff's director. On 3 October 1989, the court granted leave to the plaintiff to issue a writ of possession against the defendant and any occupier of the premises. Then by a summons-in-chambers dated 11 October 1989, the defendant/applicant filed in the court this present application to have the writ of possession suspended or stayed.

Mr Yap, counsel for the applicant, said that the applicant are controlled tenants, this fact being disputed by the plaintiff/respondent. They are so since they have been residing there since 1947 and had been paying rental of $119.60 to Carima Binaan Sdn Bhd. The applicant annexed the birth certificate of one of his sons who was born in the said premises. Counsel submitted further that it was only on 7 June 1989 that the applicant received the letter of the auctioneers, the letter dated 2 May 1989 ('YC-2'), from which they learned that the premises had been bought by one Law Kueck Shin and that the tenants were asked to deliver vacant possession. The applicant then instructed their solicitors to write a letter ('YC-3') to inform the auctioneers that they had been staying in the premises for the last 20 years. There was no response and finally on 12 June 1989, the applicant wrote to the plaintiff to say that their rents were being deposited with the solicitors. When there was again no response, the applicant wrote personally to the plaintiff ('YC-6').

Counsel for the applicant submitted that the order for sale and vacant possession of 1 March 1989 could not have the effect of depriving the rent controlled tenants. The only way by which the controlled tenants could be deprived is by strictly following the provisions of the Control of Rent Act 1966.

As far as the writ of possession went, the applicant's counsel submitted that the tenants had no knowledge of it except about 10 days ago; the tenants only knew of it when the bailiff attached the premises. He said that under O 45 r 3 of the Rules of the High Court 1980, leave has to be obtained. He said no such leave was so obtained. If an order of suspension or stay is given, the applicant would be applying to the court to intervene in OS No 564/88, applying to set aside that part of the order dated 1 March 1989 granting possession to the chargee bank.

The applicant's counsel cited a number of authorities, the effect of which went to show that only a Rent Control Tribunal could grant recovery of possession in accordance with the provisions of the Control of Rent Act 1966. Counsel also submitted that O 45 r 3 of the Rules of the High Court 1980 requires that the applicant tenants be made a party. Counsel submitted the procedure under the English Rules would appear to be the same, that leave to issue writ for possession will not issue unless the person or persons in actual possession of the land had been served with a notice of the proceedings so as to enable them to apply to the court for any relief to which he may be entitled. If the defendant is in actual possession, then the affidavit must also state whether the occupier is protected under the Rent Act. Counsel then cited *Woo Yew Chee* v *Yong Yong Hoo*[1] which decided that though a property was purchased in 1962, it did not cease to be controlled premises and that the character did not change with the coming into force of the Control of Rent Act 1966.

The applicant submitted that the order dated 1 March 1989 for possession is therefore bad as the rent controlled tenants had never been served and the tenants were never given the opportunity to state their case. The applicant therefore prays for a stay order in order that they may apply to intervene in OS No 564/88 and to apply to set aside that part of the 1 March 1989 order granting possession to the chargee bank. If it is appropriate, the applicant may even consider a separate action.

Mr Parthiban, for the respondent, confirmed that the respondent had bought and paid for the premises at an auction sale pursuant to the order of court dated the 1 March 1989 whereby the defendant in that foreclosure proceeding was to give the seller vacant possession. All documents in respect of the sale had been executed and the price money had been paid in full.

Subsequent to the purchase of the premises at the sale, the respondent applied for leave for the issue of writ of possession and leave was granted on 3 October 1989. The application for leave was made ex parte because the present defendant/applicant was not a party to the order obtained on 1 March 1989 (the parties being *Bank Bumiputra Malaysia Bhd* v *Carima Binaan (J) Sdn Bhd* — OS No 564/88). The position is that the plaintiff in this present application did not recognize the tenants as tenants or protected tenants under the Control of Rent Act 1966. They are in fact illegal occupiers. The auctioneers had served the court's order of 1 March 1989.

Counsel for the respondent also submitted that there was delay in making this application. If the applicant was seriously challenging the order of 1 March 1989, they could have applied in early June 1989, the auction being on 27 May 1989. Instead of challenging or asking to intervene, the applicant's solicitors wrote to the respondent's solicitors a letter ('YC-4' encl (11)) stating that the order was not binding on them. Then their solicitors wrote 'YC-5' and 'YC-6'. They wanted to create the relationship of landlord and tenant. Mr Parthiban submitted that even at the date of hearing of the applicant's application (21 October 1989), the applicant had not filed any application to intervene, the applicant explaining it away by saying it is in the process of being applied for.

On the other hand, the respondent is an innocent purchaser for value whose order was already perfected on 1 March 1989. If the applicant wished to intervene, he submitted that there is no way how it could be done since the order has already been perfected. At this stage, if the applicant wished to challenge, they should file a fresh action. As to the application or the intention to have the order of 1 March 1989 set aside, he submitted that there is no power for the court to set aside its own order. He cited *Hock Hua Bank Bhd* v *Sahari bin Murid*[2] where it was held that the learned judge had no jurisdiction to set aside an order or to vary his own order. Counsel cited *Lim Yoke*

Foo v *Eu Finance Bhd*[3] at p 20 where the learned judge cited with approval *Subramaniam* v *Muthiah Chetty*[4] in which the court upheld a sale carried out in purported pursuance of two orders which were bad and which would have been set aside if an appeal were lodged against them. He therefore submitted that the order for sale dated 1 March 1989 would not be the subject of an action. He also cited *Oversea-Chinese Banking Corp Ltd* v *Sindoma Realty Sdn Bhd*[5] which echoes the same principle.

Lastly, the sale to the respondent was by virtue of s 267 of the National Land Code 1965. Upon the respondent being granted the certificate of sale, the sale shall be registrable and the certificate shall free the purchaser of any more liability. He submitted that the court should protect a bona fide purchaser.

The question for the court is should the court grant an order suspending and/or staying the writ of possession issued by it under the inherent jurisdiction of the court or under O 45 r 11 of the Rules of the High Court 1980 until the determination of the relief the applicant said they are entitled to, and is applying to the court in Johore Bahru High Court OS No 564/1988 (foreclosure action)?

Whether the court will grant the order of suspension or stay prayed for must depend on the purpose for which it is made, ie to enable the applicant to apply to intervene in the foreclosure action and also to a large extent must depend on the likely success of such a step. After considering these factors, I am of the firm view that the applicant cannot apply to intervene and if he does, on the authorities in the current application, is bound to fail. Hence I exercised my discretion to dismiss the application.

As was quite rightly pointed out by counsel for the respondent, there was inordinate delay. The applicant came to know about this foreclosure on 2 June 1989 but he did not take any positive step. His counsel's letter filing this application was dated 11 October 1989.

The order dated 1 March 1989 for the sale of the premises to the respondent was a valid order and in the absence of any appeal being lodged, prima facie, it is a valid and good order for execution. The auction sale by the court was pursuant to that valid order. I agree with the respondent's counsel's submission as to the effect of an auction sale under s 267 of the National Land Code 1965. The purchaser is issued with a certificate of sale which is registrable.

As to the applicant's contention that under O 45 r 3 of the Rules of the High Court 1980, the writ should not have been issued as it is not in accordance with that order, I am of the view there is no substance in that submission. Order 45 r 3 provides:

> (1) Subject to the provisions of these rules, a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means, that is to say —
>
> (a) writ of possession;
> (b) in a case in which rule 5 applies, an order of committal.
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> (2) A writ of possession to enforce a judgment or order for the giving of possession of any immovable property shall not be issued without the leave of the Court except where the judgment or order was given or made in a charge action to which O 83 applies.
>
> (3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the immovable property has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.

It is the contention of the applicant that that order of the court dated 3 October 1989 granting leave was bad because it was ex parte and the applicant who is alleged to be a tenant was not served. On my reading of O 45 r 3(2) of the Rules of the High Court 1980, I am of the view that since the judgment or order giving possession of the immovable property (the premises) was by virtue of a charge action to which O 83 applies, there was therefore no necessity for the respondent to have applied for leave to issue a writ of possession. I am of the view that since that is the case, the requirement of O 45 r 3(3) was not required to be complied with. It was only an application for leave outside the ambit of O 83 or where O 83 does not apply that one had to resort to O 45 r 3.

I therefore hold that even under O 45 r 3, or under the inherent jurisdiction of the court, I find that there is no reason for me to suspend or stay the writ of possession which was issued by virtue of the fact that the respondent was a bona fide purchaser at an auction sale where the respondent was clothed with a registrable certificate of sale. On this ground that the respondent was a bona fide purchaser, I dismiss the applicant's application with costs to be taxed.

Application dismissed.

Solicitors: *L Parthiban & Associates; Arthur Lee, Yap & Netto.*

Reported by *Kevin Mathews*